IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Reportable

Case no: 20699/2021

In the matter between:

JUNAID BECKLES Applicant

(Identity Number: 8[...])

and

SB GUARANTEE COMPANY (RF) PTY LTD Respondent

(Registration Number: 2006/021576/07)

Neutral citation: *Junaid Beckles v SB Guarantee Company (RF) Pty Ltd* (Case no: 20699/2021) [2026] ZAWCHC (10 June 2026)

Coram: LOUW AJ

Heard: 11 May 2026

Delivered: Electronically on 10 June 2026

Summary: The applicant sought to suspend a court order granted in favour of the respondent (mortgagor) and to set aside the warrant of execution against the applicant's mortgaged property that flowed from the court order. However, the applicant failed to file the necessary documents and withdrew the application shortly before the hearing, exactly as he had done previously. Relying on Rule 41(1)*(a)*, the respondent contended that the court should exercise its discretion not to accept the withdrawal and dismiss the applicant's application with costs. In light of the applicant's repeated conduct and the prejudice caused, the court exercised its discretion, dismissed the application and awarded punitive costs.

ORDER

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1. The applicant's application is dismissed with costs awarded to the respondent on an attorney and client scale, to be taxed on scale B.

JUDGMENT

Louw AJ:

Introduction

[1] On 13 April 2025 the applicant, Junaid Beckless ('the debtor'), instituted proceedings against the respondent, SB Guarantee Company (RF) Pty Ltd ('SB Guarantee Company'). The relief sought was the suspension of a court order granted in SB Guarantee Company's favour on 10 May 2022,[1] the setting aside of the warrant of execution issued on 31 August 2022 pursuant to that order, and costs of suit in the event of the application being successful.

[2] SB Guarantee Company obtained summary judgment against the debtor on 10 May 2022 for payment of R1,437,209.40, together with interest at 8.150 per cent per annum from 4 November 2021 until the date of payment ('the court order'). The court also granted an order declaring specially executable the property mortgaged to the SB Guarantee Company, namely erf 5[...] Parow ('the immovable property'). A reserve price of R1,900,000.00 was set in respect of the sale in execution of the property. It is common cause that the property has not yet been sold.

[3] The matter was set down for hearing on 11 May 2026. SB Guarantee Company filed heads of argument on 28 April 2026 in accordance with the Practice Directive. The debtor failed to file a replying affidavit or heads of argument. The debtor, seemingly represented by attorneys Khorommbi Mabuli Inc, withdrew the application on 24 April 2026 against SB Guarantee Company and tendered wasted costs. From the outset, SB Guarantee Company opposed the

[1] It must be noted that the debtor in error keeps indicating the date of judgment granted as 23 June 2022 instead of the actual date which is 10 May 2022.

application in its entirety and set out its grounds of opposition, discussed further below, and did not accept the withdrawal.

[4] On 11 May 2026, neither the debtor nor his attorneys appeared in court, due to them withdrawing the application. Counsel for SB Guarantee Company requested that the present matter proceed. Counsel placed reliance on Rule 41(1)*(a)* of the Uniform Rules, which regulates the withdrawal of proceedings by a litigant. The rule provides that a party who has instituted proceedings may withdraw them at any time before the matter is set down, or thereafter only with the consent of the opposing party or the leave of the court, by delivering a notice of withdrawal that may include a tender of costs. SB Guarantee Company did not consent to the withdrawal. In invoking this rule, counsel sought to persuade the court that it is empowered to bring the proceedings to an end and accordingly requested that the debtor's (applicant's) application be dismissed, with costs.

[5] The court permitted counsel to continue, noting that this was the second occasion on which the debtor had engaged in precisely the same conduct: withdrawing the application shortly before the hearing, tendering wasted costs, and failing to appear. The first application had been instituted on 26 April 2024 and was withdrawn on 27 February 2025, only days before the hearing scheduled for 12 March 2025 ('first application').

Factual background

[6] Some factual background is necessary to understand this judgment, particularly in relation to how the SB Guarantee Company came to be the mortgagor of the immovable property and how the indebtedness arose. The circumstances are somewhat peculiar, and they bear directly on certain observations made by the court.

[7] The debtor purchased the immovable property during April 2016 and approached Standard Bank of South Africa Ltd ('Standard Bank') for a loan amount of R700 000.00 and successfully obtained the loan. Later, the debtor applied for a further loan of R600 000.00 in April 2019. Both loans were granted by Standard Bank and the total principal loan amount was thus R1 300 000.00.

[8] In respect of both loan agreements, the debtor and SB Guarantee Company concluded written indemnity agreements on 19 April 2016 and 4 April 2019, respectively. In terms of these agreements, the debtor acknowledged that SB Guarantee Company would be obliged to make payment to Standard Bank of all amounts owing by the debtor in the event of default under the loan agreements, referred to in the indemnities as 'home loan agreements' concluded with Standard Bank. The debtor further indemnified SB Guarantee Company against any claims arising from his default under the loan agreements, and acknowledged that, in the event of his failure to pay any amounts due, SB Guarantee Company would be entitled to realise the mortgage bonds furnished by the debtor as security.

[9] Certain clauses in the indemnities are of particular relevance. In particular, paragraph 3.1, titled "Indemnity for Claims Under the Guarantee," provides that:

'Except to the extent that the Guarantor [SB Guarantee Company] acted with gross negligence, fraudulent intent or in breach of any of its obligations in terms of the Guarantee, the Borrower [the debtor], *as a separate and independent primary obligation, indemnifies and holds the Guarantor harmless from and against all loss, damage, cost, expenses and liabilities which the Guarantor may suffer or incur* as a result of or in connection with any claims which may be made against the Guarantor by the Bank or by the Transferee arising in any manner out of in in connection with the Guarantee.' (Own emphasis.)

[10] Other relevant paragraphs of the indemnities are:

'3.3 On receipt by the Borrower [the debtor] of any written notice from the Guarantor [SB Guarantee Company] stating that an amount is payable by the Borrower in accordance with the terms of this Indemnity and demanding payment of such amount, the Borrower must, immediately following such written notice of demand, pay such amount without any deduction, in cash into a bank account nominated in writing, by the Guarantor.

3.4 The Borrower will not have the right to deduct any amount which the Bank or Transferee may owe the Borrower in terms of the Loan Agreement from any amount owing or which may become owing by the Borrower to the Guarantor in terms of this Indemnity. …

3.6 The Borrower will not have the right to refuse to make payment to the Guarantor by reason of the fact that –

3.6.1 the Guarantor has not paid the claims of the Bank or the Transferee under the Guarantee; or

3.6.2 the liability of the Guarantor in terms of the Guarantee is limited in the manner set out in the Guarantee.'

[11] Another important clause is paragraph 3.7 that provides:

'On the Signature Date, the Borrower shall be, and shall remain bound to the full extent of this Indemnity, which shall at all times be fully and immediately enforceable, despite –

3.7.1 any unenforceability, illegality or invalidity of any obligation of the Borrower or any other person under the Loan Agreement or Security Agreement;

3.7.2 the fact that any intended security may not be obtained or be defective or may be released or may cease to be held by the Bank or the Guarantor for any reason;

3.7.3 the fact that the Loan Agreement or Security Agreement or this Indemnity may be varied, novated or replaced whether by agreement, operation of law, or otherwise;

3.7.4 the fact that the Guarantor or Bank may elect any particular remedy against the Borrower to the exclusion of any other remedy;

3.7.5 the fact that the Bank or the Guarantor (as the case may be) may give extended terms or any other indulgence to the Borrower or may accept party payment or other benefit in settlement or any other compromise in terms of the Loan Agreement or Security Agreements;

3.7.6 the fact that the Borrower or the Bank or the Guarantor (as the case may be) may be sequestrated, placed in liquidation or under curatorship or business rescue proceedings, or otherwise become subject to any other legal liability or to any law for the benefit or assistance of debtors and/or creditors;

3.7.7 the taking, exchange, renewal, release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of any person or any failure to realise the full value of any security; and

3.7.8 any other fact or circumstance which may have the effect of wholly or partially relieving the Borrower from its obligations in terms of the Loan Agreement or the Security Agreements.'

[12] The indemnities provide that the debtor's liability remains in full force as continuing security until SB Guarantee Company is fully and finally released from its guarantee obligations to Standard Bank. The debtor may not withdraw from or terminate the indemnities until such release and cancellation occur. Additionally, the debtor waives, to the extent permitted by law, the benefit of division, meaning liability will not be apportioned among co-debtors and each may be held liable for the full indebtedness.[2]

[13] During March 2015, Standard Bank and SB Guarantee Company concluded a written common terms guarantee agreement. In terms thereof, and in consideration for each debtor entering into an indemnity agreement and registering a mortgage bond in favour of SB Guarantee Company over the relevant property pursuant to a home loan agreement, SB Guarantee Company undertook to guarantee the due and punctual payment of all amounts then owing, or which may thereafter become owing, by each debtor to Standard Bank in terms of the respective home loan agreements.

[14] Paragraph 3.7 of the common terms guarantee agreement even goes as far as stating that:

> 'The Guarantor [SB Guarantee Company] indemnifies the Creditor [Standard Bank] and holds it harmless on demand against any loss, liability, damage, claim, cost or expense that the Creditor may incur if any obligation guaranteed by the Guarantor in terms of this Agreement is or becomes void, voidable, invalid unenforceable or ineffective in any respect for any reason. The amount of that

[2] See paragraphs 3.8-3.9 of the indemnities.

loss, liability, damage, claim, cost or expense shall be the amount with the Creditor would otherwise have been entitled to recover had that obligation been enforceable, valid and legal.'

[15] The common terms guarantee agreement further provides that, upon written notice from Standard Bank to SB Guarantee Company that a debtor has breached any obligations under a home loan agreement, SB Guarantee Company is required to immediately fulfil its obligations under the guarantee. The notice must set out details of the breach, identify the debtor, and specify the full amount owing. Upon receipt of such notice, SB Guarantee Company is obliged to pay the outstanding amount due by the debtor.

[16] In this matter, on 19 April 2016 and 4 April 2019, and pursuant to the conclusion of the home loan agreements and indemnity agreements with the debtor, SB Guarantee Company furnished Standard Bank with two written guarantees. Further, and in accordance with the loan agreements, a first and second mortgage bond were registered over the immovable property in favour of SB Guarantee Company as security for the aforesaid debts.

[17] The debtor later defaulted on his repayment obligations to Standard Bank. Although there appear to have been some attempts by the debtor to resolve the matter and to make repayment, these did not materialise. Standard Bank accordingly called upon the guarantees issued by SB Guarantee Company and to discharge the amount it had undertaken to cover on the debtor's behalf. This led SB Guarantee Company to institute legal proceedings against the debtor,

culminating in a default judgment and an order authorising execution against the mortgaged property registered in its favour on 10 May 2022. Initially, the matter was pursued by way of an application for summary judgment, which the debtor opposed, attributing his financial hardship to the Covid-19 pandemic. However, when the matter came before court, neither the debtor nor his counsel appeared, and a default judgment was consequently granted. The court further granted an order declaring the immovable property mortgaged to SB Guarantee Company specially executable.

[18] Chronologically, the debtor first instituted an application on 26 April 2024 seeking to suspend the court order and set aside the warrant of execution. SB Guarantee Company had opposed the first application, and both parties filed all affidavits and heads of argument, but the debtor withdrew his application on 27 February 2025, shortly before the hearing scheduled for 12 March 2025.

[19] The debtor thereafter launched a second, similar application on 13 April 2025, again seeking the same relief in respect of the order granted on 10 May 2022, which was set down for hearing on 11 May 2026. SB Guarantee Company once again opposed the second application. Although it filed its heads of argument on 28 April 2026, the debtor failed to deliver a replying affidavit or heads of argument and withdrew the application on 24 April 2026, shortly before the scheduled hearing. It is this second withdrawal that relates to the matter before this Court.

Issue for determination

[20] The main issue before the court was whether, in light of Rule 41(1)(a) and the circumstances surrounding the withdrawal, the court should exercise its discretion to bring the proceedings to an end by dismissing the debtor's application with costs, rather than permitting a mere withdrawal.

Arguments in the matter

[21] As noted, neither the debtor nor his counsel appeared before court in the first application for the suspension of a court order and setting aside of the warrant of execution, the application having been withdrawn shortly before the hearing.

[22] In his founding affidavit in the first application, the debtor contended that the principal basis for seeking relief was that SB Guarantee Company had frustrated his attempts and counterproposals to resolve the matter amicably. In essence, he alleged that while he was endeavouring to negotiate a settlement agreement, SB Guarantee Company proceeded with its application for summary judgment, thereby acting in bad faith in rejecting his proposals. He further maintained that the institution of this application was not merely a delaying tactic, emphasising that as the immovable property had not yet been transferred to a third party, no prejudice would arise. Lastly, he asserted that the property is his family's primary residence and that he is the head of the household, relying in this regard on section 26(1)

of the Constitution, which guarantees the right of access to adequate housing.

[23] In the founding affidavit of the current (or second) application for the suspension of a court order and setting aside of the warrant of execution, the debtor relies on the same grounds he relied upon in his first application, but also adds another ground namely that SB Guarantee Company engaged in reckless lending practices when the second loan amount was approved by Standard Bank, specifically that SB Guarantee Company had failed to conduct a proper affordability assessment as required by section 81(2) of the National Credit Act ('NCA').[3] Requesting the court to declare the agreement concluded with SB Guarantee constituting reckless credit and to make an order as permitted by section 83 of the NCA, namely to either set aside all or part of the consumer's rights and obligations under the agreement or suspend the force and effect of the agreement.

[24] SB Guarantee Company opposed the first application for the suspension of a court order and setting aside of the warrant of execution as well as the current (second) similar application before this court. In its answering affidavit in the first application for the suspension of a court order and setting aside of the warrant of execution, it denied that the debtor had made any viable settlement proposal, emphasised that he had failed to adhere even to his own payment proposals, and maintained that the matter could therefore not be resolved. It questioned why the debtor had not opposed the

[3] 34 of 2005.

summary judgment application when it was heard, despite having had the opportunity to do so, and highlighted that he offered no explanation for instituting the present application, more than two years after judgment had been granted.

[25] SB Guarantee Company further pointed out that the debtor had failed to indicate the period for which the order ought, in his view, to be suspended. It argued that suspension would not be just or equitable in the circumstances. Reference was made to Rule 45A of the Uniform Rules, in seeking a suspension of the operation of the court order and setting aside the warrant of execution, which permits suspension only where real and substantial justice requires it or where injustice would otherwise result. On this basis, SB Guarantee Company contended that no grounds had been advanced to justify the relief sought or the debtor's lengthy delay in approaching the court. It also stressed that the debtor remained unable to make payments under the loan agreement with Standard Bank.

[26] The SB Guarantee Company went on to emphasise that the debtor had consciously and willingly, with the intention of securing the loan advanced by Standard Bank, mortgaged the immovable property in favour of SB Guarantee Company. He did so with full knowledge that in the event of default and breach of the mortgage bond, SB Guarantee Company would rely on the security and seek an order declaring the property executable. In light of the debtor's continued failure to meet his obligations, SB Guarantee Company was entitled to the judgment already granted in its favour.

[27] As to the debtor's reliance on his constitutional right of access to adequate housing, SB Guarantee Company argued that this did not assist him, as he would still be able to afford alternative accommodation by way of a lease agreement.

[28] In the second application, the one before this court, counsel argued that it was unclear whether the debtor relied on the aforementioned grounds solely for the suspension of the court order or whether those same grounds were also advanced in support of setting aside the warrant of execution. As the matter was withdrawn, no heads of argument or replying affidavit were filed, and neither the debtor nor his counsel appeared to advance these contentions further. In the absence of clarity, counsel proceeded on the basis that the debtor relied on those grounds in respect of both forms of relief sought.

[29] Counsel further contended that the grounds advanced by the debtor appear to constitute defences to the summary judgment and Rule 46A proceedings, which ought properly to have been raised during those proceedings.

[30] It was submitted that the debtor also failed to demonstrate how these grounds fell within the ambit of Rule 45A, or to explain the inordinate delay in bringing the present application several years after the court order was granted. Counsel also set out the applicable legal principles governing Rule 45A and submitted that the debtor has failed to satisfy the requirements for the relief sought. In relation to Rule 45A, counsel

relied on *Gois t/a Shakespeare's Pub v Van Zyl and Others*,[4] where the court summarised the general principles applicable to the granting of a stay of execution. Counsel further relied on *R.A v F.A,*[5] where Lekhuleni J emphasised that a court has a wide discretion to grant a stay of execution, which must be exercised judicially in the interests of justice, and only where real and substantial injustice would otherwise result.[6] It was submitted that 'an applicant must establish a prima facie right that he wants to protect in the main action',[7] akin to the requirements of an interim interdict, by demonstrating a pending claim or challenge. It was argued that the debtor in the matter before court failed to set out the requirements for an interim interdict, did not identify any injustice to be averted, and did not seek rescission of the order; accordingly, the application ought to be dismissed with costs.

[31] Counsel for SB Guarantee Company submitted that the debtor failed to make out a proper case for the setting aside of the warrant of execution. It was argued that such relief does not automatically follow from a request to suspend the court order, particularly where the debtor does not seek rescission or setting aside of that order itself. A party seeking to set aside a warrant must advance specific grounds, such as non-compliance with the court order, incorrect citation of parties, extinguishment of the debt, or unlawful procurement of the writ. In this matter, the debtor failed to provide any basis for the relief sought and could not rely on the same grounds advanced for

[4] 2011 (1) SA 148 (LC) at para 37.
[5] (14491/2020; 14490/2020; 19594/2021) [2024] ZAWCHC 35 (9 February 2024).
[6] At paras 19 and 20.
[7] *R.A v F.A* at para 20.

suspension of the order. Accordingly, counsel contended that the debtor cannot succeed in having the warrant of execution set aside.

[32] In response to the debtor's contention that SB Guarantee Company failed to consider his attempts at settlement, counsel submitted that, notwithstanding the debtor's indication of a willingness to settle, he failed to adhere to his own proposed payment plan. The debtor remained substantially indebted, with arrears continuing to increase, and his last payment having been made on 11 September 2025. It was further argued that SB Guarantee Company was under no obligation to halt litigation merely because the debtor expressed an intention to settle, particularly where the proposed payments were insufficient to address the outstanding arrears. In any event, the debtor was not precluded from settling the arrears, administrative charges, and legal costs, which may revive the credit agreement in terms of section 129(3) of the NCA. Counsel submitted that this contention does not even constitute a valid defence to the summary judgment, let alone a basis for suspending the court order in the present application.

[33] Counsel for SB Guarantee Company submitted that the reckless lending allegation was a belated attempt to delay execution, having not been raised during the summary judgment proceedings, the Rule 46A application, or the debtor's earlier suspension application. It contended that documentary evidence, including the loan application and reckless lending investigation report, demonstrated that a proper affordability assessment was conducted and that the debtor had sufficient income to service the loan. The debtor did not dispute this

evidence. Furthermore, the debtor's current version of his income and expenses contradicted the information he provided when applying for the loan and that his claim that he did not understand the credit agreement was implausible, given his prior borrowing history. Therefore, the debtor raised the issue of reckless credit only as a last-minute attempt to delay enforcement of the judgment.

[34] SB Guarantee submitted that the debtor's reliance on the constitutional right of access to housing did not justify the suspension of the court order. It argued that the debtor has failed to demonstrate how this ground satisfies the requirements for such relief. Relying on *Gundwana v Steko Developmen*t[8] and *ABSA Bank Ltd v Petersen*,[9] SB Guarantee Company contended that execution against immovable property is permissible where there are no reasonable alternative means to satisfy the judgment debt. The right to housing is not absolute and generally yields to a mortgagee's right to realise its security, absent bad faith or evidence that the debt can be satisfied through less drastic measures.

[35] The debtor has produced no evidence that SB Guarantee acted in bad faith or that alternative means exist to satisfy the debt, therefore SB Guarantee Company further submitted that, as a private party, it was entitled to enforce its contractual and security rights under the mortgage bond and was not responsible for fulfilling the State's constitutional housing obligations. In their view, this ground was raised merely to delay execution of the court order.

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[8] *Gundwana v Steko Development* 2011 (3) SA 608 (CC) at para 54.
[9] [2012] 4 All SA 642 (WCC); 2013 (1) SA 481 (WCC) at para 34.

[36] On the day the matter was set down for hearing, counsel for SB Guarantee Company relied on Rule 41(1)(a) of the Uniform Rules and requested the court to dismiss the application of the debtor on the basis that the rule grants the court the authority to refuse the acceptance of a withdrawal. Rule 41(1)*(a)* provides:

> 'A person instituting any proceedings may at any time before the matter has been set down and thereafter *by consent of the parties or leave of the court* withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.' (emphasis added)

[37] In this regard, counsel referred to *Erasmus: Superior Court Practice*,[10] which comments on Rule 41(1)(a) and states that, once a matter has been set down for hearing, the party who instituted the proceedings may not withdraw them without either the consent of all the parties or the leave of the court. In support of this proposition, *Erasmus* relies on *Bondev Midrand (Pty) Ltd v Madzhi*e.[11] In the absence of such consent or leave, a purported notice of withdrawal is invalid, as confirmed in *Protea Assurance Co Ltd v Gamlase*.[12]

[38] *Erasmus* further records that the court has a discretion whether to grant leave, and that considerations of potential injustice to the opposing party are central to the exercise of that discretion, as established in *Pearson and Hutton NNO v Hitzeroth*,[13] and supported

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[10] Van D E Van Loggerenberg *Erasmus Superior* Volume 2, Second Edition (loose-leaf) at pages D1 Rule 41–2 to D1 Rule 41–3, Service 29, 2026.
[11] 2017 (4) SA 166 (GP) at 170E.
[12] 1971 (1) SA 460 (E) at 465G.
[13] 1967 (3) SA 591 (E) at 593D and 594H.

by *Karroo Meat Exchange Ltd v Mtwazi*[14] and *Huggins v Ryan NO*.[15] However, it is also recognised that a court will not ordinarily compel a party to proceed with litigation against its will or inquire into the reasons for abandoning it, as emphasised in *Levy v Levy*.[16]

Applicable legal principles and discussion

[39] The debtor has, throughout these proceedings, placed scant information before the court. He did not participate in the summary judgment application when the court order was granted on 10 May 2022, and has withdrawn two applications, including the present one, only days before they were due to be heard in court, without filing heads of argument in either. No compelling reasons have been advanced to justify suspending the operation of the judgment or setting aside the warrant in its entirety.

[40] As the debtor withdrew his application, no replying affidavit was delivered and no heads of argument were filed on his behalf. The Court is therefore not in a position to fully ventilate the issues or make any definitive findings on the merits of the relief sought by the debtor, namely the suspension of the court order granted in favour of SB Guarantee Company and the setting aside of the warrant of execution issued pursuant thereto. Any comments made in this regard are accordingly, no more than preliminary observations based on the papers before the Court, namely the founding affidavit of the debtor,

[14] 1967 (3) SA 356 (C) at 359B–C.
[15] 1978 (1) SA 216 (R) at 218D.
[16] 1991 (3) SA 614 (A) at 620B.

the answering affidavit and the heads of argument filed on behalf of SB Guarantee Company.

[41] During argument, the counsel of SB Guarantee Company referred the court to authority on Rule 45A, outlining the principles governing suspension of court orders and warrants of execution. On the facts before me, there is nothing to persuade this Court not to dismiss the debtor's application and to rule in favour of SB Guarantee Company. The debtor's conduct since the inception of these proceedings permits a negative inference to be drawn.

[42] Counsel for SB Guarantee Company argued that many of the defences raised by the debtor in the present application, including the alleged violation of his constitutional right of access to adequate housing and the belated defence of reckless lending, ought properly to have been advanced in opposition to the summary judgment and Rule 46A application, or at the very least, during his first suspension application.

[43] Furthermore, counsel for SB Guarantee Company submitted that the debtor's reliance on Rule 45A, in seeking both the suspension of the operation of the court order and the setting aside of the warrant of execution, is misconceived. The debtor neither advances any grounds justifying the suspension of the court order nor makes out a case for its rescission. In *Malherbe v Wesbank, Malherbe v Wesbank, a*

Division of Firstrand Bank Limited[17] the court confirmed that Rule 45A confers a discretion on the court to suspend the execution of an order where real and substantial injustice would otherwise result. To succeed, an applicant must show not only potential irreparable harm, but also that there is a pending rescission application or other substantive challenge with reasonable prospects of success. This requirement aligns with the need to establish a prima facie right, as the court will be guided by principles similar to those applicable to interim interdicts.

[44] The court has a discretionary power to permit or refuse the withdrawal in terms of Rule 41(1)*(a)* of a matter once it has been set down for hearing. In exercising this discretion, it must consider potential prejudice or injustice to the other party, although it will not ordinarily compel a party to continue with proceedings against its will.

[45] In light of the debtor's conduct, the court is not persuaded that its discretion ought to be exercised in favour of permitting the debtor's withdrawal. The debtor has sought to withdraw the application on two occasions, in each instance only a few days prior to the scheduled hearing, after causing significant delays in the prosecution of the matter. This pattern of conduct has resulted in wasted costs and has occasioned clear prejudice to SB Guarantee Company, who has repeatedly been required to prepare for hearings which did not proceed.

[17] (8343/2024) [2026] ZAWCHC 127 (11 March 2026) in para 9.

[46] Although the debtor tendered to pay wasted costs on both occasions, such tenders were vague and unspecified, and no steps have been taken to give any effect to them. These further compounds the prejudice suffered by SB Guarantee Company.

[47] In these circumstances, the court is satisfied that permitting a withdrawal would be unjust. The cumulative effect of the debtor's repeated delays, last-minute conduct, and failure meaningfully to address the issue of wasted costs leaves the court with little choice but to refuse the requested withdrawal. Accordingly, the application is dismissed.

[48] This Court cannot revisit the merits of the judgment or the execution order, nor can it suspend an order granted in favour of SB Guarantee Company (mortgagor) or set aside the warrant of execution issued against the applicant's mortgaged property pursuant to that order. It is confined to dealing with the matter as it presently stands. Nonetheless, certain observations must be made in the interests of justice and the protection of consumers, particularly as they stand in an unequal bargaining position when dealing with banks and financial institutions. Of concern is the manner in which the indemnity or independent guarantee entered into between the applicant as debtor and SB Guarantee Company arose, how the parties interpret that agreement, and whether the NCA finds application to it.

[49] Equally troubling is the conduct of Standard Bank in granting the loan amounts to the debtor. While these issues cannot reopen the case, they remain significant in circumstances where the debtor is a natural

person and consumer (debtor), particularly as the protections afforded by the NCA are primarily directed at safeguarding natural persons in their capacity as consumers.

[50] It is common cause that this matter originated from two credit agreements concluded between the debtor (as consumer) and Standard Bank as credit provider. Standard Bank advanced two loans to the debtor and, in each instance, required the debtor to execute indemnities in favour of Standard Bank with SB Guarantee Company, seemingly a subsidiary of Standard Bank. SB Guarantee Company is not registered as a bank. Under these arrangements, SB Guarantee Company indemnified the debtor against default on the loans, and a mortgage bond was registered over the immovable property each time. In the event of default, SB Guarantee Company would, upon demand, settle the outstanding amount owed by the debtor with Standard Bank and thereafter enforce its indemnities against the debtor by foreclosing on the mortgage bonds it (that is, SB Guarantee Company) held.

[51] It is clear that the loans granted by Standard Bank were unsecured loans falling within the ambit of the NCA, despite them being called 'home loan agreements'. The indemnities, however, do not fall under the NCA, as they are not credit agreements regulated by that Act. Section 8(5) read together with section 4(2)*(c)* of the NCA are applicable only to suretyship agreements and do not apply to indemnities or independent guarantees. This distinction appears to have been overlooked by all parties, including counsel for SB Guarantee Company.

[52] What troubles me is that, in the ordinary course of business, banks granting mortgage loans or home loans to consumers (natural persons) secure such credit by registering a mortgage bond over immovable property in the banks' favour, and where necessary, by requiring a suretyship as additional security. A suretyship is ordinarily furnished by a third party, such as a director in relation to a juristic person or another individual, who undertakes liability for the obligations (debts) of the principal debtor. '[A] suretyship agreement is an important tool that credit providers use in limiting the risk of granting credit – a third party provides surety to pay where the original (principal) debtor fails to pay.'[18] In this matter, however, Standard Bank extended unsecured credit to the debtor, while requiring him to execute indemnity agreements or independent guarantees issued by SB Guarantee Company in the bank's favour; SB Guarantee Company then secured its exposure by registering mortgage bonds over the debtor's property in its own favour. The effect of this arrangement is that Standard Bank, upon default, recovers the debt owed directly from SB Guarantee Company, which in turn enforces its indemnities against the debtor by foreclosing on its mortgage bonds.

[53] This structure raises concern. The loans by Standard Bank clearly fall within the ambit of the NCA, yet the indemnities do not, as they are not credit agreements regulated by the Act. Unlike a suretyship, which is accessory to the principal debt and allows the surety to rely on the

[18] PN Stoop and M Kelly-Louw 'The National Credit Act regarding suretyships and reckless lending' (2011) 14 (2) *PELJ* 67 at 68.

debtor's defences – including reckless lending – the indemnity constitutes an independent payment obligation. The debtor, when pursued under such indemnities, cannot invoke the protections of the NCA. This invites the question whether Standard Bank has devised a mechanism or structured its lending arrangements in a manner that circumvents the application of the NCA.

[54] Section 8(5) of the NCA provides that, regardless of its form (excluding a policy of insurance, credit extended by an insurer solely to maintain premium payments, a lease of immovable property, or a specific stokvel transaction), an agreement constitutes a credit guarantee if a person undertakes to satisfy, upon demand, the obligations of another consumer arising from a credit facility or credit transaction to which the NCA applies. While section 4(2)*(c)* provides that the NCA applies to a credit guarantee only to the extent that it applies to the underlying credit facility or credit transaction. Accordingly, if the NCA does not apply to the primary debt, it will likewise not apply to the credit guarantee.[19]

[55] Forsyth and Pretorius define a suretyship as:[20]

> 'an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), that the principal debtor, who remains bound, will perform his obligation to the creditor and that if and so far as the principal debtor fails to do so, the surety will perform it or, failing that, indemnify the creditor'.

[19] Stoop and Kelly-Louw above fn 18 at 80.
[20] C F Forsyth and J T Pretorius Caney's Law of Suretyship in South Africa 5 ed (2002) at 27-28, with footnotes omitted.

Forsyth and Pretorius explain that a surety's obligation is accessory in nature, meaning that a valid suretyship requires a valid principal obligation between the debtor and creditor. The suretyship is therefore dependent on, and conditional upon, the existence of this principal debt. If no valid principal obligation exists, the surety is generally not bound and may raise any defence available to the principal debtor.[21]

[56] A suretyship is a secondary, accessory obligation dependent on a valid principal debt. The surety undertakes that the principal debtor will perform and becomes liable upon default. This liability is co-extensive with the principal obligation: if the principal debt is void, discharged or reduced, the surety's liability falls away, and the creditor must prove the debtor's default if it is disputed. By contrast, a primary guarantee, such as an indemnity or independent guarantee, creates a separate, autonomous obligation. An independent (demand) guarantee is generally a concise and simple instrument issued by a bank (or other financial institution) under which the obligation to pay a beneficiary a fixed or maximum sum of money arises simply upon the making of a demand for payment in the prescribed form and occasionally also the presentation of documents as stipulated in the guarantee within the period of validity of the guarantee.[22] The guarantor's liability is primary and enforceable independently of the underlying contract. Upon an honest demand by the beneficiary, the guarantor must pay, regardless of disputes between the principal

[21] *Idem* at 28.
[22] M Kelly-Louw 'Construction of demand guarantees gone awry' (2013) 25 *SA Merc LJ* 404 at 409; D Warne and N Elliott *Banking Litigation* 2 ed (2005) at 277; J O'Donovan & J C Phillips *The Modern Contract of Guarantee* English edition (2003) at 525.

debtor and the beneficiary, which must be resolved separately. Accordingly, where proof of breach or non-performance is required, the guarantee is not primary but accessory in nature.[23]

[57] The independent and absolute character of a contract of indemnity distinguishes it from the subsidiary and accessory nature of a contract of suretyship.[24] Although there is no statutory or universally accepted definition, a contract of indemnity may be defined as an agreement in terms of which one person (the indemnifier) undertakes, as principal debtor, to compensate or hold another (the indemnified) harmless against any loss, damage, or liability incurred as a result of specified past or future events, regardless of the nature of those events.[25]

[58] The term 'credit guarantee' in the NCA refers only to accessory (secondary) guarantees, such as suretyships. It does not include primary guarantees, such as indemnities or independent (demand) guarantees, which operate independently of any underlying contract.[26] As a result, the application of the NCA to a 'credit guarantee' mirrors its application to the underlying debt, as is likewise the case with a suretyship, which serves as a clear example of this principle.

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[23] Stoop and Kelly-Louw above fn 18 at 75-77.
[24] A A Roberts, *Wessel's Law of Contract in South Africa* 2 ed Vol 2 (1951) at § 3795 and A P M De Villiers *The Suretyship and the Indemnity Contract Differentiated* (unpublished, LLM dissertation, University of South Africa, undated) at 6. In *Minister of Transport and Public Works, Western Cape, and Another v Zanbuild Construction (Pty) Ltd and Another* 2011 (5) SA 528 (SCA), the Supreme Court of Appeal emphasised that the nature of a payment obligation, whether accessory or independent, is determined not by its label or heading, but by its substance and proper construction. Thus, even if the words 'suretyship' and 'guarantee' are used in an agreement, their meaning must still be gathered from the context (see *List v Jungers* 1979 (3) SA 106 (A) 118C–E)
[25] De Villiers above fn 24 at 8–9.
[26] Stoop and Kelly-Louw above fn 18 at 78-82 and 89.

[59] Although no party has raised this issue in the papers, it is in the interests of justice to, at least, record these concerns. Section 90 of the NCA stipulates when provisions in a credit agreement are unlawful, including where their purpose or effect is to defeat the Act's policies or deprive consumers of its protections. The consequences of such unlawfulness are severe, potentially rendering the entire agreement void.[27] It is therefore an open question whether the credit agreements concluded by Standard Bank in this matter and manner contained unlawful provisions by requiring indemnities that fall outside the scope of the NCA. This is not the first matter before me where a similar arrangement has been employed by banks and other financial institutions or insurance companies.

[60] From SB Guarantee Company's affidavit and heads of argument, it appears that Standard Bank did conduct an affordability assessment when granting the loans, although the debtor disputes that it was properly undertaken. Standard Bank also issued a section 129 default notice upon default and afforded the debtor some opportunity to remedy the breach before claiming under the indemnities. Once Standard Bank demanded payment from SB Guarantee Company in terms of those indemnities, however, the application of the NCA effectively ceased, as did the credit agreement itself, since Standard Bank was no longer a credit provider owed money. The foreclosure proceedings then became a matter solely between SB Guarantee Company and the debtor, no longer grounded in a credit agreement subject to the NCA.

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[27] Section 90(4) read with section 89(5) of the NCA.

[61] This arrangement is notably confusing, and it appears that neither SB Guarantee Company nor its counsel has adopted a consistent position on the applicability of the NCA to the indemnities. There is no provision in the indemnities indicating that any election was made to subject them to the NCA. This uncertainty regarding the application of the NCA is evident from the certificate of balance, which certify in paragraph two 'that the amount claimed represents the principal debt and finance charges as permitted in terms of Section 101(d) and Section 102 of the National Credit Act 34 of 2005 owing by the Mortgagor(s) to SB Guarantee'. Moreover, counsel for SB Guarantee Company in her heads of argument, suggested that the debtor retained the protection of section 129(3)[28] of the NCA to remedy the credit agreement, which is, at best, doubtful. In its Answering Affidavit, SB Guarantee Company contends that it was Standard Bank, not SB Guarantee Company, that approved and advanced the loan to the debtor. Furthermore, it emphatically denies that either Standard Bank or SB Guarantee Company engaged in reckless lending practices, or that they failed to conduct a proper affordability assessment.[29] Even more perplexing is the fact that paragraph 5 of the court order, likewise records that the debtor has recourse to section 129(3).[30]

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[28] Section 129(3) provides that:
'Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time of the default was remedied'.

[29] See para 65 of the Answering Affidavit at page 15.

[30] Paragraph 5 of the court order reads as follows:
'The Defendant is notified that in terms of S129(3) of the National Credit Act 34 of 2005 the Defendant may, at any time prior to the sale in execution of the property, in the event an order for such sale is granted in future (and before cancellation of the agreement), reinstate the credit agreement by paying to the Plaintiff all amounts that are overdue (i.e. in arrears), together with the Plaintiff's permitted default

[62] Further confusion arises from the fact that SB Guarantee Company responds to the debtor's allegation of reckless lending under the NCA. In my view, this issue is entirely misplaced. The indemnities upon which SB Guarantee Company relies do not fall within the ambit of the NCA, as they cannot properly be characterised as suretyship agreements. The NCA therefore has no application to the indemnities concluded between the debtor and SB Guarantee Company.

[63] It follows that allegations of reckless lending are irrelevant to the present dispute and cannot constitute a defence to the enforcement of SB Guarantee Company's rights under the indemnities. To the extent that any allegation of reckless lending may arise, it would relate only to the underlying credit agreements (home loans) concluded between the debtor and Standard Bank, and not to the separate indemnity obligations owed to SB Guarantee Company.

[64] The finance structure thus raises the question whether Standard Bank employed this arrangement as a means of strategically limiting the application of the NCA to its credit agreements. I make no ruling on this issue, as it was not placed before me, but it is appropriate to record these concerns.

Costs

[65] Counsel for SB Guarantee Company submitted that, in the event of judgment being granted in its favour, costs should follow the result

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charges and reasonable costs of enforcing the agreement up to the time of reinstatement, which amounts, charges and costs the Plaintiff must on enquiry from the Defendant furnish to the Defendant.'

and be awarded against the debtor on a punitive basis, specifically on the attorney and client scale, particularly on scale B. This submission was based primarily on the debtor's prior conduct in withdrawing the matter, the resulting prejudice to SB Guarantee Company, and the wasted costs occasioned thereby.

[66] It is trite that costs lie within the discretion of the court and that punitive cost orders are not granted lightly, but are reserved for conduct that is dishonest, vexatious, or otherwise deserving of censure. In the present matter, although the court has limited insight into the precise reasons for the debtor's two withdrawals, the pattern of repeated, last-minute withdrawals, coupled with the prejudice caused to SB Guarantee Company and the failure meaningfully to address wasted costs, justifies an adverse inference regarding the debtor's conduct. In these circumstances, I am satisfied that a punitive costs order is warranted.

Order

[67] The following order is made:

1. The applicant's application is dismissed with costs awarded to the respondent on an attorney and client scale, to be taxed on scale B.

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M LOUW

ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant: No appearance

Instructed by: Khrommbi Mabuli Inc, Cape Town

For respondent: Adv C Francis

Instructed by: Tim du Toit & Co Inc, Cape Town